

Complainant (Portland)

v.

Respondent A (Portland)

Respondent B (New York)

I. COMPLAINANT'S CHARGE:

Complainant, Complainant, diagnosed with chronic major depression and generalized anxiety, and Crohn's Disease, alleges disability discrimination, contending that after completing his training as a customer care representative, he required and requested reasonable accommodations of time off to obtain mental health treatment for his depression and anxiety. His request was denied and his employment was terminated.

II. RESPONDENT'S ANSWER:

Respondent respond that after completing part of his training program, Complainant requested medical leave. After more than two months, when medical evidence to substantiate Complainant's entitlement to disability status had been received, his job was posted and his employment was terminated.

III. JURISDICTIONAL DATA:

- 1) Date of alleged discrimination: 6/16/08.
- 2) Date complaint filed with the Maine Human Rights Commission: 9/17/08.
- 3) Respondent, Respondent A employs more than 200 employees; is required to abide by statutory provisions of the Maine Human Rights Act, the Americans with Disabilities Act, and both State and Federal employment regulations.
- 4) Complainant is represented by Kristin Aiello, Attorney.

Respondent is represented by Lendall Smith, Attorney

- 5) Investigative methods used: a review of the written materials provided by the parties; additional information specific to elements of the charge.

IV. DEVELOPMENT OF FACTS:

1) Complainant, the employer, records and documents confirm the following:

- a) Respondent B, Inc. is a national healthcare corporation doing business as Respondent A. Respondent Maine is a subsidiary of Respondent B.
- b) Complainant, 47, was hired 2/4/08 as a Customer Care Representative I, spending the first eight weeks of employment in a classroom training program. Complainant scored a 98% on his final exam. A few days after the start of his second phase of training, “working the phones” / “learning lab” / shadowing with experienced Customer Care representatives, Complainant “began experiencing debilitating symptoms of depression and anxiety.” He met with his psychiatrist and vocational worker to establish a plan for treatment and reasonable accommodation to continue his employment at Anthem. He was absent from work beginning 4/8/08. He was informed that he had not worked long enough to qualify for FMLA or MeFML benefits.
- c) Complainant informed Anthem of his need to be accommodated by time off from work to receive treatment, and received Anthem’s packet entitled, “Accommodation Request, American’s with Disabilities Act” on 4/10/08.

The packet stated “A job description has been requested from your manager. You will need to take a copy of your job description to your healthcare provider to review. After your healthcare provider reviews your job description, they must complete the enclosed healthcare provider certification form.”

The packet specified that the requested medical documentation was due 4/25/08 and that “any delay could result in the denial of the request.”

- d) (Record of correspondence/communication)

Complainant contacted his anthem disability case manager on 4/25/08, advising that he could not meet with his healthcare provider until 5/8/08. An extension was granted, with paperwork due 5/9/08.

Complainant emailed his Anthem disability case manager that his psychiatrist would not be able to fax the report to anthem until Monday, 5/13/08.

The Anthem disability case manager granted the extension.

- e) The information was received 5/12/08.

The five (5) page questionnaire provide by Complainant’s treatment provider stated in part:

- That Complainant currently had a psychological disorder, major depression and generalized anxiety disorder.
- That Complainant’s disability “prevents(s) or severely limit(s) the individual from performing. . .major life activities. . .thinking, interacting with others, learning, concentrating, working patient’s own job.”

- (treatment provider's hand written notes) "anxiety episodes cause functional difficulty at times with these areas. These have been long-term, but likely will be managed with treatment. . .can impact working his computer or talking with customers. . ."
- Question: How long will patient be substantially limited in the life activities?
Answer: one month, estimated
- Question: Would you characterize your patient's condition as temporary?
Answer: no, but manageable. . .this is a lifetime condition that can periodically impair the person if effective management is not in place.
- Question: Please describe the essential functions the patient is unable to perform and why they cannot be performed.
Answer: "Research and present information, interact effectively with customers, complete work in timely fashion."
- Question: Do you believe the patient needs a leave of absence because of his condition, disorder?
Answer: Yes, anxiety has not been adequately managed.
- Question: Are there any mitigating measures (medication, treatments, surgery, etc.) that can be taken that would remove any substantial limitation to any major life activities?
Answer: Treatment with medication and individual psycho therapy.
- Treatment provider's typed note.

Complainant believes he would be good in his job once he gets back to it. He is feeling less anxious and is ready to return to work, but I would recommend some accommodations that would help him make the transition successfully. Mr. VC, the vocational counselor, and I both talked with Ms. Complainant about a plan that might be helpful for him, and might be a reasonable way to approach his returning to work. We came up with a plan that included him returning to work for 3 mornings a week in the first week, from 8:30 until 12:30 during the morning shift, and then increasing the number of days per week by 1 day every week after that, so by week #3 he would go in 5 days a week during the morning shift. After that, he could start working afternoon shifts in a stepwise fashion. In addition, it would be helpful for Ms. Complainant to be able to have a bit more flexibility when he takes breaks, at least in the first 2 months or so after he returns, so that if he starts feeling anxious, he can utilize his break as a time when he could calm down and perhaps do some relaxation techniques, which often are helpful for anxiety. In addition, I recommended that he speak with his direct supervisor and coordinate this, so this could be worked into his routine in as smooth a way as possible. In addition, we thought that if he were having an increase in anxiety during a telephone call with a customer, it would be reasonable for him to politely end the call and agree to call the customer back a few minutes later, when his anxiety had dissipated and his concentration has returned.

- Anthem's Disability manager had written, "not reasonable," regarding the treatment provider suggestions, "if he were having an increase in anxiety during a telephone

call. . .politely end the call. . .call back . . .later.”

- f) Anthem immediately informed Complainant that further information was needed, and sent a notification to Medical Records Department (Complainant’s treatment provider’s name) on 5/15/08.

“We are in need of medical records from Dr. [treatment provider] for patient, Complainant. I am in need of progress notes and treatment plan for the period of 2/2007 through present. This information is needed for further evaluation under the ADA.

Attached is a copy of Complainant’s authorization to release medical information.

Please fax or mail this medical information to my attention. [fax number and mailing address.]

If possible, please return this information by 5/30/08. If you have questions, please contact me [number given]. Thank you for your assistance regarding this matter.”

- g) On 5/16/08, Anthem’s disability case manager emailed Complainant to enlist his aid in seeking his medical records. “You may want to call the office to help expedite this request. I will need your reports by 5/30/08. Additionally, your manager reports you are not calling in and keeping her updated as requested. Please do so.”
- h) A second request to Complainant’s treatment provider for Complainant’s “progress notes and treatment pan for the period of 2/2007 through present” was made by Anthem’s disability case manager on 5/28/08.
- i) On 6/5/08, Anthem’s disability case manager emailed Complainant again.

“Complainant, I have sent a couple requests to your Dr. for your records and I have not received a response at this time. I am sending another request today. Please follow up with this doctor for this information.

Thank you, [disability case manager]

- j) On 6/13/08, after no responsive information by the treatment provider was received, Complainant was notified as follows: (emphasis supplied)

This letter is regarding your request for an accommodation under the Americans with Disabilities Act (ADA) and/or applicable state law. Respondent B is committed to providing reasonable accommodations to enable disabled individuals to perform the essential functions of their job. In order to qualify for accommodations under the ADA, you must meet the ADA definition of a person with a disability. The ADA defines a person with a disability, in part, as someone with a physical or mental impairment that substantially limits a major life activity.

The information from your health care provider has been reviewed. The information provided is not sufficient to determine whether you have a disability as defined by the ADA. As such, your request for accommodations under the ADA has been denied, and your file has been closed.

In the event you feel you may be a qualified individual with a disability as defined by the ADA and require reasonable accommodations to enable you to perform the essential functions of your job, a Health Care Provider Certification form and a copy of your medical records from February 1, 2007 through the present will be required from your treating physician to provide the necessary documentation about your disability and functional limitations to evaluate your eligibility under federal and/or applicable state law.

- k) On 6/17/08, Complainant received a letter of dismissal.

This letter is to notify you that your employment with Respondent B has been terminated as of June 16, 2008.

I have been advised by the Leave of Absence Unit that you do not have job protection rights under the federal Family and Medical Leave Act and your ADA claim has been denied. This letter serves as notice that due to business needs, it is necessary for the company to post your position and to seek a replacement.

- 2) Complainant, thorough counsel, provides the following information.

- a) After receiving Complainant's detailed reasonable accommodation request, Respondent never engaged in a dialogue with Complainant about his request. Instead, Anthem "repeatedly made illegal requests for all of Complainant's medical records, including progress notes, from one year before he worked for Anthem, to the present. This medical inquiry was illegal, not job related, not consistent with business necessity. Respondent conducted illegal medical inquiries and then admonished Complainant for not complying with an illegal request.
- b) Complainant states that there were eight people in his Customer Care Representative training class, three of whom dropped out. The Anthem trainer shared with trainees that the drop out rate at Anthem's Maine office was near forty percent. New training classes are constantly beginning because of this demand.

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Here, Complainant, Complainant, alleges and Respondents, Respondent A and Respondent B, denies, failure to provide reasonable accommodations, dismissing Complainant for disability reasons, and making unlawful inquiries.

EMPLOYMENT REASONABLE ACCOMMODATION

- 3) Pursuant to the Maine Human Rights Act, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise

qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity.” 5 M.R.S.A. §§ 4553(2)(E), 4572(2).

- 4) Complainant was dismissed on 6/16/08. The statutory definition of disability follows:

5 M.R.S.A. § 4553-A “Physical or mental disability” . . .

1. Physical or mental disability, defined. “Physical or mental disability” means:

A. A physical or mental impairment that:

- (1) Substantially limits one or more of a person’s major life activities;
- (2) Significantly impairs physical or mental health; or
- (3) Requires special education, vocational rehabilitation or related services;

B. Without regard to severity unless otherwise indicated: . . . Crohn’s disease . . . major depressive disorder . . . ;

C. With respect to an individual, having a record of any of the conditions in paragraph A; or

D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A.

- 5) The term "qualified individual with a disability" means “an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 5 M.R.S.A. § 4553(8-D). Examples of “reasonable accommodations” include, but are not limited to, making facilities accessible, “[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . .” 5 M.R.S.A. § 4553(9-A). The term “undue hardship” means “an action requiring undue financial or administrative hardship.” 5 M.R.S.A. § 4553(9-B).
- 6) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a “qualified individual with a disability” within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant’s physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent’s failure to do so affected the terms, conditions, or privileges of Complainant’s employment. *See id.*
- 7) Generally, it is Complainant’s responsibility to request a reasonable accommodation. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001). It is Respondent’s burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an “undue hardship.” *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm’n Reg. 3.08(D)(1) (July 17, 1999).
- 8) The interpretive guidance to the Equal Employment Opportunity Commission’s regulations provide, in part, the following regarding an employer’s obligation to engage in an “interactive process” to identify an appropriate accommodation:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

29 C.F.R. § 1630.9, App.

9) Consideration of the reasonable accommodation question, given the information, documents, and records, leads to the following conclusions:

- a) It is undisputed that Complainant was disabled because of major depression, generalized anxiety disorder, and Crohn's (stomach) disease. He has a record of disability, described as "a lifetime condition that can periodically impair" by his psychiatrist.
- b) By virtue of his experience, knowledge, skills, training, and ability, Complainant could have performed the essential functions of his customer care representative job, but for his disabilities.
- c) Complainant is, however, unable to establish a showing of unlawful denial of accommodation.
- d) Through no fault of his own, because of his major depression and anxiety disorder, according to his treatment provider, Complainant was:
 - Unable to work, or to be at work, from 4/8/08 - 6/13/08, when Complainant's doctor estimated he might be able to return to work.
 - That Complainant's disability "prevents or severely limit's the individual from performing major life activities. . .thinking, interacting with others, learning, concentrating, . . .working patient's own job."
 - Anxiety episodes cause functional difficulty at times with these areas. These have been long term, but likely will be managed with treatment. . .can impact working his computer or talking with customers. . .
 - (Question to treatment provider): Please describe the essential functions that patient is unable to perform and why they cannot be performed?
(Answer from treatment provider): "research and present information, interact effectively with customers, complete work in a timely fashion."
- e) Complainant was clearly unable to perform several functions of his Customer Care Representative job according to his treatment provider.

- f) As of 4/10/08, the employer determined that Complainant was unable to perform essential job functions and that “due to business needs, it is necessary to post your position and seek a replacement.”
- g) The Maine Human Rights Act:
Does not:
- Relieve a disabled applicant from the obligation to perform the essential functions of the job; or
 - Require employers to lower production standards.
- h) Here, the employer was informed by the employee’s treatment provider that Complainant was unable to perform the essential functions of his job, “thinking, interacting with customers, working his computer” (treatment provider).
- i) Complainant states, and Anthem does not disagree, that in the two month CSR training program Complainant was part of, three of the eight dropped out (Complainant made four (4)); that the turnover is usually over 40%; and that training classes were constantly started to keep up with the demand to fill Customer Care Representative positions.
- The employer posted Complainant’s position due to legitimate business needs to seek a replacement. To leave Customer Care Representative positions open would have constituted an undue hardship to the business.
- j) Complainant had been on leave for five weeks as of 5/13/08, when his treatment provider made the assessment that Complainant was unable to perform essential job functions. There was no accommodation available to enable Complainant to continue to work at Anthem.

TERMINATION

10) 5 M.R.S.A. § 4573-A(1-B) Defenses, states as follows:

Physical, or mental disability. This subchapter does not prohibit an employer from discharging or refusing to hire an individual with physical or metal disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an individual with physical or mental disability, if the individual, because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or is unable to be at, remain at or go to or from the place where the duties of employment are to be performed.

- 11) The MeHRA clearly provides that an employer may discharge an employee who, for disability reasons, is unable to perform the essential functions of his job, or who cannot be at his worksite.
- 12) For this reason, and for reasons in 9 of the Analysis above, no unlawful termination is found.

IMPERMISSIBLE INQUIRY

13) For persons already employed (as opposed to pre-employment inquires) 5 M.R.S.A. § 4572

(2)(D) states the following:

“A covered entity may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.”

- 14) a) EEOC’s “Enforcement Guidance on Disability-Related Inquiries and Medical Examinations” (2002) answer the questions:
- What documentation may an employer require from an employee who requests an accommodation?
 - What documentation is sufficient; is insufficient?
 - What documents an employer can, and cannot, ask for.
- b) An employer may require an employee to provide documentation that is sufficient to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. This means that, in most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.
- c) Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.
- d) Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or, (3) other factors indicate that the information provided is not credible or is fraudulent. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided. Any medical examination conducted by the employer's health care professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.
- e) The [EEOC] has previously stated that when an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual provide more documentation and/or submit to a medical examination could be considered retaliation. However, an employer that requests additional information or requires a medical examination based on a good faith belief that the documentation the employee submitted is insufficient would not be liable for retaliation.
- 15) Consideration of the information, documents, and records in this matter results in the following conclusions:

- a) Complainant's treatment provider (psychiatrist) described the nature, severity, and duration of Complainant's impairment as, "major depression and generalized anxiety disorder; a life time condition; a permanent, substantial limitation severely limiting major life activities thinking,. . .interacting with others,. . .learning, concentrating,. . .working patient's own job." (doctor's answer to question 5)
- b) The treatment provider also listed the several essential functions of Complainant's job adversely impacted by his disability, "interaction with customers, ability to concentrate, thinking," etc; and the extent which the impairment limits his ability to perform, "can impact working his computer and talking with customers."
- c) The information provided was clearly sufficient:
 - To establish that Complainant was disabled, as defined by the MeHRAAct and the ADA.
 - That he was substantially limited in performing the essential functions of his job, thinking, operating his computer, and interacting with customers.
 - That additional leave was necessary to allow for treatment before Complainant could return to work.
 - The answers to the employer's "job related" and "consistent with business necessity" questions clearly articulated the nature, extent, and limitations of Complainant's disability and its impact upon his ability to perform specific essential functions of the Customer Care Representative job. No further medical inquires were necessary or warranted.
- d) Nonetheless, the employer insisted repeatedly that Complainant's progress notes and treatment plans from 2/20/07 through 5/16/08 be provided, "for further evaluation under the A.D.A."

Such requests are contrary to statutory provisions of 5 M.R.S.A. § 4572 (2)(D) above.

VI. RECOMMENDATIONS:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that unlawful medical inquires were made by Respondents to Mr. Complainant.
- 2) That conciliations be attempted in accordance with 5 M.R.S.A. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe that Respondents unlawfully dismissed Mr. Complainant for disability reasons or that Respondents failed or refused to accommodate Mr. Complainant.
- 4) That these charges be dismissed in accordance with 5 M.R.S.A. § 4612(2).

Patricia E. Ryan, Executive Director

Paul D. Pierce, Investigator